SUPREME COURT, U. S.
MOTION FILED FEB 13 1959

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 178

SS "MONROSA", her engines, tackle, etc. and NAVIGAZIONE ALTA ITALIA,

Petitioners,

— versus —

CARBON BLACK EXPORT, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE

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Motion for Leave to File a Brief as Amicus Curiae

The American Institute of Marine Underwriters hereby respectfully moves for leave to file the brief *amicus curiae* annexed. The consent of the attorney for the respondent has been obtained. The consent of the attorney for petitioners was requested but refused.

The interest of American Institute of Marine Underwriters in this case arises from the fact its members insure cargoes carried to or from United States ports, and their rights of subrogation, and, as a consequence the premiums to be paid by American cargo interests, are gravely affected by the issue before the

Court, namely, whether a carrier may provide in a bill of lading subject to the United States Carriage of Goods by Sea Act that suit for breach thereof may be brought only in the courts of a foreign country.

In the instant case respondent ably presented in the Court of Appeals the reasons why such ouster of the jurisdiction of American courts is invalid, but did not consider the legislative history supporting this position. Since respondent may also omit reference to this matter in this Court, it is believed that the attached brief which *amicus curiae* is requesting permission to file, will contain additional argument on the question to be decided. If this argument is accepted, it would be dispositive of this case.

Respectfully submitted,

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February 11, 1959

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BRIEF OF AMICUS CURIAE

Interest of Amicus Curiae

American Institute of Marine Underwriters is an association of underwriters who, among other activities, insure cargo moving in international commerce subject to the Carriage of Goods by Sea Act, 49 Stat. 1207 (1936), 46 U. S. C. §§ 1300-15 (1952), hereinafter described as COGSA. The uniformity in carriers' obligations which this Act was designed to create, is threatened by clauses inserted in bills of lading seeking to oust American courts of jurisdic-

tion, causing variation of risk, complicating determination of premiums and increasing expense to cargo interests.

Summary of Argument

Recognizing the inherent inequality of cargo shippers in dealing with carriers, Congress, by the Carriage of Goods by Sea Act, established minimum obligations of common carriers engaged in transporting goods to or from United States ports in foreign trade. By the device of a contractual provision in their forms of bills of lading purporting to oust American courts of jurisdiction, carriers are attempting to evade these obligations and to defeat the legislative intent.

ARGUMENT

I

A contractual limitation on the choice of forum violates public policy. As a shipper is powerless to vary the terms of a bill of lading offered to him, he must be protected against a contractual restriction of the forum which benefits solely the carrier.

It has long been established that an agreement restricting a litigant's right to sue in any appropriate forum is unenforceable. *Insurance Company* v. *Morse*, 87 U. S. 445 (1874). Although conceding this, the Court of Appeals for the Second Circuit in *Wm. H. Muller & Co., Inc.* v. *Swedish American Line Ltd., et al.*, 224 F. 2d 806 (2d Cir.), *cert. denied* 350 U. S. 903 (1955), held such an agreement to be valid

unless unreasonable. The restriction under consideration in that case appeared in a bill of lading issued in Sweden covering the carriage of goods from Sweden to the United States, subject to COGSA. Believing that American law would be applied properly by the Swedish courts, to which jurisdiction was limited by the bill of lading provision, the Court of Appeals upheld the ouster of jurisdiction, leaving the American cargo owner to sue the Swedish carrier in a Swedish court.

Apparently recognizing that the agreement limiting the forum could not be reasonable unless the shipper's consent thereto "was freely given", the Court of Appeals found in *Wm. H. Muller & Co., Inc.* v. *Swedish American Line Ltd., et al.*, supra, that "for aught that appears" that condition had been met, ignoring the vast difference in the bargaining power of the parties. Maritime history shows that cargo interests are unable, except through legislation, to obtain transportation on reasonable terms. Knauth, *The American Law of Ocean Bills of Lading* (4th ed. 1953), p. 119. Because of the unequal bargaining power of shipper and carrier, Congress found it necessary, first in 1893 through the Harter Act, 27 Stat. 445 (1893), 46 U. S. C., §§ 190-196 (1952), and then in 1936 through COGSA, to support the shipper by defining the carrier's responsibilities, which it significantly provided could be increased, but not diminished. Gilmore and Black, *The Law of Admiralty* (1957), p. 125.

In view of the superior bargaining power of the carrier, it cannot be assumed that a shipper has freely agreed to a clause appearing in the fine print of a bill of lading limiting suit for cargo loss or

damage to the courts of the foreign country of the ship's flag or, as in the present case, to the court in a certain foreign city where the carrier has its principal office. As no possible advantage can accrue to the cargo owner by a restriction on its right to sue the carrier in any forum where jurisdiction can be secured, the fact that the bill of lading contains such a restriction is of itself indicative of the relative bargaining power of the parties and emphasizes the unreasonableness and one-sided nature of the restriction.

When it is further considered that in most cases the party which seeks to recover for loss or damage to cargo is not the shipper but the consignee, who first learns of the terms of the bill of lading after the goods have been paid for through an irrevocable letter of credit, the evil of the clause becomes even clearer.

One of the purposes of Congress in passing the Carriage of Goods by Sea Act was to free interested parties from concern as to the provisions of the contract of carriage. The Act was intended to produce "uniformity and simplification of bills of lading" which "will be of immense value to shippers who will be relieved of the necessity of closely examining all bills of lading to determine the exceptions contained therein to ascertain their rights and liabilities; to underwriters who insure the cargo and are met with the same difficulties; and to bankers who extend credit upon the bills of lading." H. Rep. No. 2218, 74th Cong., 2d Sess.

In the present case, the bill of lading contract provides that the rights of the parties shall be gov-

erned by COGSA. When a foreign court is to interpret United States law, it has the disadvantage of not being able to recognize our law judicially: it must be established as a fact through the testimony of experts. This increases the chance of error, even if the foreign country in which the court is sitting has adopted the Hague Rules, as it seems reasonable to assume that the judge may be influenced by the national interest.

A bill of lading restriction of forum is inequitable in that it fails to provide a corresponding surrender of the carrier's privilege of choosing the forum in which to sue the cargo owner for freight, or general average contribution. The restriction serves only the convenience of the carrier by corralling all cargo suits into its home territory.

As a substantial number of the cargoes which may be the subject of suit will not have been shipped to or from ports in the foreign country where suit is required, the forum provided for in many instances would not be acceptable under the principles of *forum non conveniens*, as would be an American court sitting at the port of shipment or discharge. If the American forum is not in fact convenient, the doctrine of *forum non conveniens* will protect the carrier from burdensome litigation.

It seems probable that, with the exception of ocean bills of lading, contractual limitations of the choice of forum will appear but infrequently. In view of the constant stream of bills of lading issued by a common carrier, the potential litigation as to the reasonableness of the restriction is substantial, and

the ingenuity of counsel in exhibiting the unfairness of the restriction as applied to the facts at hand will be at a premium.

II

Congress' intention that United States law shall regulate shipments to or from United States ports may be thwarted by enforcing an agreement to sue abroad, as there is no certainty that COGSA will be applied.

Congress has unmistakably provided that COGSA shall govern all ocean bills of lading pertaining to cargo contracted to be carried to or from United States ports in foreign trade. 46 U. S. C. §1300. By providing in the bill of lading that suit for cargo loss can only be brought in a foreign court, a carrier may escape having its responsibilities determined according to United States law.

There is much opportunity for a foreign court to be misled in face of the many conflicting provisions in the usual bill of lading. COGSA may not be mentioned at all and, if it is, there may be a provision that foreign law shall also control the rights of the parties. Knauth, *op. cit.*, supra, p. 161.

The foreign court is not bound by legislative fiat to apply COGSA, and there is no appeal to an American court from a foreign court which applies foreign law instead. As no American court can guarantee that a foreign court will apply COGSA, the owner of a shipment should not be required to litigate his rights in a foreign court. To carry out the legis-

lative purpose of having all disputes involving damage to such cargo resolved according to the standard laid down by COGSA, requires the voiding of a clause denying the cargo owner the right to try his case in an American court, where it is certain COGSA will prevail.

III

Where carriage is to the United States, the conflict between the laws in effect at the ports of shipment and discharge will be resolved by a foreign court in favor of foreign law. A clause requiring suit abroad thus excludes application of our law to import shipments, contrary to the purpose of Congress.

A shipment moving in international trade encounters two systems of law. Under the usual conflicts rule, the law of the place of contract governs, causing foreign law to apply to shipments bound for U. S. ports. *E. Gerli & Co.* v. *Cunard S. S. Co. Limited,* 48 F. 2d 115 (2d Cir. 1931); note, *Ocean Bills of Lading and Some Problems of Conflict of Laws,* 58 Colum. L. Rev. (1958), p. 216. Congress has made it mandatory for United States courts to fix the responsibilities of the carrier in accordance with United States law. COGSA, Sect. 1300. The courts of other nations have received a legislative mandate to apply their own version of the Hague Rules in respect of export shipments. Knauth, *op. cit.*, supra, pp. 156, 453. The courts of the remaining maritime nations may be expected to apply their own law.

As to cargo destined for a United States port, a clause requiring suit abroad thus, in effect, provides

that foreign law shall govern to the exclusion of COGSA. Such a clause will have the same effect as to cargo exported from the United States to any of several European nations, which apply their own legislation where shipment was made from a country which has adopted the Hague Rules. Knauth, *op. cit.*, supra, p. 156.

That it is advantageous to a carrier to have its own foreign law apply is clear, even where the Hague Rules are in force. Aside from whether foreign interpretation of the applicable sections of the Hague Rules may be more favorable, each of the foreign versions of the Hague Rules limits the carrier's liability to a certain amount per package expressed in the money of the country in question. Knauth, *op. cit.*, supra, p. 283. In the present case, where effort is made to force the cargo owner to litigate in Italy, the Italian version of the Hague Rules limits the carrier's liability to 2500 Italian lira per package or approximately $10. Knauth, *op. cit.*, supra, p. 287. Versions of the Hague Rules adopted in various foreign countries set various limitations on the carrier's liability, and, except in the case of Canada, the limitation per package is far less than the $500 provided by COGSA. In Sweden, which was the country in interest in *Wm. H. Muller & Co., Inc.* v. *Swedish American Line Ltd., et al.*, supra, the limitation is the equivalent of $347; in England, $280; in France, $142.50. The limitation in the Italian version of lira equal to $10 per package, is the lowest of all.

Since a clause requiring suit in a foreign court applying the law of the forum will bring about limitation of the carrier's liability to a smaller sum than permitted by COGSA, such clauses, we submit, contravene 46 U. S. C. §1308 of that Act and are void.

IV

Requiring suit in a foreign court is tantamount to providing that a foreign limitation statute shall measure the carrier's liability. As such statutes guarantee a maximum liability not provided in our statute, the clause requiring suit abroad is void as lessening the carrier's liability in violation of Section 8 of COGSA.

One of the privileges reserved by COGSA to a vessel owner is to limit liability in accordance with the United States limitation statute in effect when loss occurs. See 46 U. S. C. §1308. This sanctions a lessening of liability where loss occurred without the privity or knowledge of the vessel owner and the total claims exceed the value of the vessel and her pending freight.

By requiring cargo interests to sue abroad, the carrier secures the benefit of a foreign limitation statute, usually the uniform Convention executed at Brussels August 25, 1924, the terms of which an American court may judicially notice. *Black Diamond Steamship Corp.* v. *Robert Stewart & Sons, Ltd. et al.*, 336 U. S. 386, 1949 AMC 393. The uniform Convention limits the owner's liability to the value of the vessel plus freight, but not to exceed 8 pounds sterling per ton, which at the present rate of exchange equals $22.40 per ton, as contrasted with the Canadian limit of $38.92 per ton. Knauth, *op. cit.*, supra, 283, 444. The benefit to the carrier of the uniform Convention is graphically demonstrated in *Black Diamond Steamship Corp.* v. *Robert Stewart & Sons, Ltd. et al.*,

supra, where cargo might recover only $325,000 under the Convention, but $1,000,000 under the American statute. On being challenged by the carrier in a court sustaining the ouster of jurisdiction where reasonable, the cargo owner is not likely to have sufficient information of the claims which might be filed to establish that by virtue of the foreign limitation statute the recovery will be less than it would otherwise be under COGSA.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be affirmed.

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